



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

JULIE ANN BERNICKY,

Complainant,

and

NATIONSBANK, CRT,

Respondent.

CHARGE: 1995 CF 3506

EEOC NO: 21B952738

ALS NO: 10530

ORDER

This matter comes on to be heard pursuant to Respondent's, Nationsbank's, motion for summary decision, filed with affidavits and exhibits attached. The Complainant, Julie Ann Bernicky, filed a response and Respondent filed a Reply. This matter is ready for decision.

Statement of the Case

On June 29, 1995, Complainant filed a charge with the Illinois Department of Human Rights (Department), alleging that she had been discharged by Respondent in retaliation for opposing discrimination. On July 10, 1998, the Department filed a complaint, alleging that Complainant was **constructively** discharged in retaliation for opposing discrimination on December 27, 1994.

Discovery commenced in this case, and Complainant requested, and was allowed to amend her complaint to allege that she was constructively discharged on December 31, 1994, in retaliation for opposing discrimination. Respondent filed its first motion for summary decision on August 25, 1999. Subsequently, Complainant requested and was

allowed to further amend her complaint to allege actual retaliatory discharge.

Respondent then filed its second motion for summary decision.

Contentions of the Parties

In order to make a prima facie case of retaliation, Complainant must show that: (1) she engaged in a protected activity; (2) an adverse action was taken against her; and (3) there was a causal nexus between the protected activity and adverse action. In its motion for summary decision, Respondent states that Complainant cannot show a causal nexus between her protected activity and the adverse action taken against her -- her termination. Respondent disputes Complainant's claim of a temporal nexus between the two incidents. Respondent states that Complainant's protected activity occurred on January 11, 1994 and she was terminated on December 31, 1994 -- almost a year had passed. This, Respondent argues, is too long of a time for Complainant to claim that a temporal nexus exists.

Next, Respondent argues that Complainant cannot show that Nationsbank's reason for terminating her -- job abandonment -- is pretextual. Nationsbank's employee handbook states that failure to return after maternity leave constitutes job abandonment and is cause for termination. Also, Respondent states that it wanted and expected Complainant to return to work after her leave of absence but she repeatedly refused to do so.

Respondent states that Complainant refused to return to work following her maternity and disability leave because of certain problems she was having with Nationsbank management. Respondent points to letters that it sent Complainant, which it

claims attempted to facilitate Complainant's return to work. After Complainant still refused to return, only then was she was terminated. Respondent argues that its attempts to facilitate Complainant's return and her refusal to return show that she was fired for job abandonment, not for engaging in protected activity.

Additionally, Respondent states that it attempted to accommodate Complainant by assigning her to her desired location and granting her an additional seven days to return. Respondent argues that its termination of Complainant was legitimate pursuant to its policies and procedures and that Complainant cannot show that Respondent's action was a pretext for unlawful discrimination.

Addressing Complainant's claim that her supervisor, Paul Hannaway, stated that when she returned he would "make her the most miserable keypunch ever", Respondent argues that even if the statement is true, Hannaway was not involved in the decision to terminate Complainant, so the statement would be irrelevant. Also, Respondent argues that the statement is not connected to Complainant's complaint of discrimination -- her protected activity -- therefore there is no evidence that it was made as a result of retaliatory animus.

In her Response, Complainant counters that she has established a causal connection between her protected activity and the adverse action taken against her. When Bernicky returned from her first pregnancy leave, she learned that she had been transferred to another location. As a result, she made her first complaint of discrimination to Nationsbank on January 3, 1994. Nationsbank denied her request to be returned to her original position, so she made additional complaints to Nationsbank on January 4, 1994 and January 11, 1994. Only then was she returned to her original

position. Complainant went on a second pregnancy leave on April 20, 1994. On December 16, 1994, before she was scheduled to return, Complainant learned that she had been transferred again, so she again complained of discrimination to Nationsbank on December 19, 1994 and December 28, 1994. Complainant argues that December 28, 1994 is the final date that she engaged in protected activity, so actually only three days elapsed before she was terminated. Therefore, a temporal, causal connection exists between her termination and protected activity.

Next, Complainant argues that Nationsbank's reason for terminating her is indeed pretextual. Complainant states that she had no intention of abandoning her job because it provided her with much needed income. Further, Bernicky states that she was justified in not returning to work until the "hostile situation" with her supervisor was rectified; Hannaway tried to fire her while she was on leave and vowed to make her the most miserable keypunch ever.

Finally, Complainant argues that Respondent's attempts to facilitate her return to work were disingenuous because they happened after adverse actions, excluding the termination, were taken against her. (e.g., the location transfers, statements made by her superiors about Complainant).

In its Reply, Nationsbank argues that Complainant's hostile environment argument is misplaced; Respondent states that it would only be relevant in a constructive discharge case. In the instant matter, Complainant alleges actual discharge. In an actual discharge case, Respondent argues, the only relevant inquiry is whether it truly discharged Bernicky for job abandonment, and that the evidence supports its contention that Nationsbank did just that.

Respondent reiterates that Complainant's protected activity is not causally related to her discharge. Respondent states that Bernicky's allegation that she complained to Nationsbank about discrimination on dates other than January 11, 1994 are new assertions and she should not be permitted to assert them now.

Preliminary Matters

In its original motion for summary decision, Respondent argued that the charge filed by Complainant in this cause was untimely.¹ Complainant received her discharge letter on December 31, 1994. She filed a charge with the Department on June 29, 1995. Exactly 180 days elapsed between these two events. Pursuant to 775 ILCS 5/7A-102A, the charge is timely filed.

Discussion

Paragraph 8-106.1 of the Illinois Human Rights Act, 775 ILCS 5/101-1 *et seq.*, specifically provides that either party may move, with or without supporting affidavits, for a summary order in its favor. If the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law, the motion must be granted. The Commission has adopted standards used by Illinois courts in considering motions for summary judgment for motions for summary orders, and the Illinois Appellate Court has affirmed this analogy. Cano v. Village of Dolton, 250 Ill.App3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 833 (1st District 1993).

¹ It is unclear whether Respondent still makes this allegation, as it was not included in its second motion for summary decision. Therefore, this tribunal will address it here.

In order to establish a prima facie case of retaliation, complainants must present facts establishing that (1) the complainant engaged in a protected activity that was known by the alleged retaliator; (2) the respondent subsequently took an adverse action against complainant; (3) there was a causal connection between the protected activity and the adverse action. Jones and Commonwealth Edison Company, Ill.HRC Rep. (1987CF1778, 1988CF3261, 9/11/95), Donald Witty and Illinois Department of Public Health, 1995 ILHUM LEXIS 575, (September 26, 1995).

The method of proving a charge of discrimination through indirect means is also well established. First, complainant must establish a prima facie showing of discrimination. If (s)he does so, respondent must articulate a legitimate, non-discriminatory reason for its actions. In order for complainant to prevail, (s)he must then prove that respondent's articulated reason is pretextual. Zaderaka v. Human Rights Commission, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

Because it is the employer's motive in firing an employee which is ultimately at issue in cases for retaliatory discharge, and because motive presents a question of fact, Illinois courts recognize that such cases should not be readily subject to disposition pursuant to motions for summary judgment. However, it must be shown that the employee's discharge was connected to his or her engaging in a protected activity. See, Fuentes v. Lear Siegler, Inc., 174 Ill. App. 3d 864, 529 N.E.2d 40 (1988).

In the case at bar, Complainant's termination is connected to her complaints to Nationsbank. Here, the only element in dispute is the causation element. I find that the Complainant has made her prima facie case. Complainant presents evidence to show that

there was a temporal connection between her termination and her complaints to Nationsbank about discrimination.

When Bernicky returned from her first pregnancy leave, she learned that she had been transferred to another location. As a result, she made her first complaint of discrimination to Nationsbank on January 3, 1994. Nationsbank denied her request to be returned to her original position, so she made additional complaints to Nationsbank on January 4, 1994 and January 11, 1994. After that third complaint, Bernicky was transferred to her original position. Complainant went on a second pregnancy leave on April 20, 1994. On December 16, 1994, before she was scheduled to return, Complainant learned that she had been transferred again, so she again complained of discrimination to Nationsbank on December 19, 1994 and December 28, 1994. Also, Hannaway attempted to fire Bernicky and intended to make her miserable. All of Hannaway's actions were due to Bernicky's complaints. Three days after her final complaint, Bernicky was terminated. Under these facts, a temporal link exists between Complainant's termination and her protected act.

Regarding Respondent's contention that one year passed between Complainant's protected act and her termination, Bernicky complained about Nationsbank's alleged discriminatory conduct all during 1994, culminating in her December 28, 1994 letter. She was terminated four days later, on December 31, 1994. Even if Respondent's assertion is accepted – that Complainant's protected act occurred only on January 11, 1994 -- the fact that there was a continuing dialogue regarding Bernicky's allegations weakens the contention that the approximate twelve month time period negates a causal link between Complainant's protected act and her termination.

Next, Respondent states that Complainant cannot prove, by a preponderance of the evidence, that its reason for terminating her was pretextual. Respondent argues that Bernicky was terminated due to job abandonment -- she did not return to work after her pregnancy leave had expired. However, Complainant has provided enough evidence to raise a question of material fact as to whether Respondent's reason for firing her was pretextual.

At the end of her first pregnancy leave, Bernicky had been transferred to a less desirable position. She complained to Nationsbank that she believed that this transfer violated her rights, which resulted in heated conversations with Nationsbank management wherein she was told that she should be happy to have a job. After three complaints however, Bernicky was restored to her original position.

After her second maternity leave, Bernicky's supervisor, Paul Hannaway, again transferred her to a less desirable position. He also refused to reinstate vacation time that had been determined to be incorrectly taken from Bernicky.

Also, there is evidence that Hannaway asked Michael Allarya, Senior managing Director at Nationsbank, for a severance package for Complainant because he wanted her fired. Additionally, when Hannaway believed that Complainant returned to work, there is evidence that he stated that he intended to make Bernicky the most miserable keypunch ever.

There is a question of material fact as to whether Bernicky's termination was connected to her complaints to Nationsbank. During her second pregnancy leave, which was after she complained due to being transferred to a less desirable position after her first pregnancy leave, Nationsbank again transferred Complainant to a less desirable

position. Her supervisor attempted to have her terminated and vowed to make her miserable upon her return.

In Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Circuit 1997), the complainant alleged gender discrimination, sexual harassment, and constructive and retaliatory discharge. As in the instant case, she was allegedly terminated because she refused to return to work unless she was assigned a new supervisor. The United States Court of Appeals upheld the summary judgment ruling in defendant's favor, stating that

Sprague failed to identify any action by [defendant] other than her termination after not returning to work for several months, which supposedly reflects . . . wrongful adverse job action. There is no indication that [defendant] terminated Sprague because she attempted to engage in protected activity or because she exercised legal rights.

Id. In the case at bar, however, Complainant offered evidence regarding Respondent transferring her to less desirable positions, her supervisor seeking to have her fired, and wanting to make her “miserable”. These are actions other than Complainant's termination, that were taken by Nationsbank and reflect wrongful adverse job actions. Sprague is distinguishable from this case. These actions raise a question of material fact concerning whether firing Complainant for job abandonment was a pretext for discrimination.

Respondent asserts that Hannaway's alleged statements are irrelevant because he did not participate in the decision to terminate Bernicky. However, his inquiries regarding obtaining a severance package for Bernicky in order to terminate her indicates that he has some authority that affects the terms and conditions of Bernicky's employment, See, Simon v. City of Naperville, 2000 U.S. Dist. LEXIS 3134 (N.D. Ill.

March 7, 2000). In light of this, Respondent's argument that Hannaway had nothing to do with the termination decision are unpersuasive.

IT IS THEREFORE ORDERED THAT:

1. Since there is a genuine issue of material fact as to whether Respondent violated the Illinois Human Rights Act, Respondent's Motion for Summary Decision is denied.

HUMAN RIGHTS COMMISSION

BY:
WILLIAM H. HALL
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: May 17, 2001